# 81-2266

No. __

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

FRANK TUROSO, LAURA SPIKER, DALENE BURGUN, WILLIAM LEE,

*Petitioners,*

—v—

THE CLEVELAND MUNICIPAL COURT, THE HONORABLE SALVATORE CALANDRA, THE HONORABLE RICHARD M. BRENNAN, THE HONORABLE FRANK O'BELL, WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Are Ohio's criminal obscenity statutes, under which petitioners were convicted and sentenced, Ohio Revised Code §§ 2907.01 and 2907.32, as construed by the Ohio Supreme Court, unconstitutional under the First and Fourteenth Amendments due to overbreadth or vagueness?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Frank Turoso, Laura Spiker, Dalene Burgun and William Lee, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the petitioners' six separate cases which were consolidated for decision by the Court of Appeals.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in consolidated case numbers 80-3695, 80-3728, 80-3742, 80-3743, 80-3817 and 81-3127, reported at 674 F. 2d 486 (6th Cir. 1982), is set forth in the Appendix at pp. A1-A23. The opinion of the District Court in petitioner Frank Turoso's case assigned No. 80-3696 in the Sixth Circuit Court of Appeals, reported at 531 F. Supp. 829 (N.D. Ohio 1980), is set forth in the Appendix at pp. A191-A237. The unreported opinions of the District Court in the other five cases consolidated for decision by the Sixth Circuit Court of Appeals are set forth in the Appendix at pp. A24-A113, pp. A130-A135, pp. A269-A274, pp. A295-A308 and pp. A340-A343, respectively. The unreported report of the United States Magistrate in petitioner Frank Turoso's case assigned No. 80-3696 in the Sixth Circuit Court of Appeals is set forth in the Appendix at pp. A240-A257. The unreported report of the United States Magistrate in petitioner William Lee's case assigned Case No. 81-3127 in the Sixth Circuit Court of Appeals is set forth in the Appendix at pp. A341-A366. The opinion of the Ohio Supreme Court in petitioner Frank Turoso's case assigned No. 80-3743 in the Sixth Circuit Court of Appeals is reported *sub nom. State v. Ronald Burgun, et al.*, 56 Ohio St. 2d 354 (1978) and is set forth in the Appendix at pp. A137-A168. The unreported order of the Ohio Supreme Court in petitioner Dalene Burgun's case assigned No. 80-3817 in the Sixth Circuit Court of Appeals is set forth in the Appendix at pp. A313-A314. The unreported opinions of the Ohio Court of Appeals, Eighth Appellate District, in the six cases consolidated for decision by the Sixth Circuit Court of Appeals are set forth in the Appendix at pp. A115-A129, pp. A169-A190, pp. A258-A268, pp. A276-A294, pp. A314-A339 and pp. A367-A378, respectively.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on February 4, 1982. The Court of Appeals denied the petitioners' application for rehearing on April 15, 1982. This petition seeks review of the judgment of a United States Court of Appeals in a civil case. This Court has jurisdiction to grant this petition under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix at pp. A383-A384. Title 28, Sections 2241, 2253 and 2254 of the United States Code are set forth in the Appendix at pp. A387-A396. Ohio Revised Code Sections 2907.01 and 2907.32 are set forth in the Appendix at pp. A397-A405.

## STATEMENT OF THE CASE

This petition seeks review of the judgment entered by a divided United States Court of Appeals for the Sixth Circuit in six separate cases which were consolidated for decision by that court because they all presented the identical question of the constitutionality of Ohio's criminal obscenity law. The cases reached the federal court of appeals on separate appeals fom conflicting decisions rendered by various federal district judges sitting in the United States District Court for the Northern District of Ohio in habeas corpus proceedings instituted by the four petitioners herein to challenge their convictions and sentences under Ohio's criminal statutes prohibiting the dissemination of obscene material.

Petitioner Turoso was convicted three times and the other petitioners were each convicted once, for selling a magazine or charging admission to a film, of pandering obscenity under

Ohio Revised Code §§ 2907.32 and 2907.01 in the Municipal Court of Cleveland, Ohio, following separate jury trials, over their timely objections that the statutes under which they were charged are unconstitutional under the First and Fourteenth Amendments due to overbreadth and vagueness.[1] The petitioners were all sentenced to jail for periods of time ranging from sixty (60) days to six (6) months and fined upon their convictions.[2] The sentences were stayed and the petitioners all remained free on bond pending their respective appeals.[3]

Each of the petitioners separately appealed his or her conviction to the Court of Appeals of Ohio, Eighth Appellate District. In all of these appeals, the petitioners renewed their attacks upon the constitutionality of Ohio's criminal obscenity statutes under the First and Fourteenth Amendments (*See* App. at A122, A176, A260, A279, A317, A369).

Petitioner Turoso's March 24, 1976 conviction was the first case to reach the Ohio Court of Appeals, which rejected his claims that Ohio Revised Code §§ 2907.01 and 2907.32 are unconstitutionally vague and overbroad (App. A183). He then appealed to the Ohio Supreme Court where he advanced the

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1 Petitioner Turoso's convictions were entered on March 24, 1976, July 23, 1976 and April 29, 1977; petitioner Spiker's conviction was entered on April 25, 1977; petitioner Burgun's conviction was entered on February 7, 1977; and petitioner Lee's conviction was entered on April 12, 1977.

2 Petitioner Turoso was sentenced to jail for 120 days, 60 of which were suspended, and fined $1,000.00 in his first case; he was sentenced to jail for six months and fined $1,000.00 in his second case; and he was sentenced to jail for 90 days and fined $1,000.00 in his third case. Petitioners Spiker, Lee and Burgun each received a sentence of 60 days in jail and a $1,000.00 fine.

3 The petitioners remained free on bond throughout their state appeals and, subsequently, have continued to remain free on bond throughout these federal proceedings. Although petitioners have not yet commenced service of the sentences imposed upon them by the Cleveland Municipal Court, they are now, and at all times have been, clearly in custody within the meaning of 28 U.S.C. §2254. *Hensley v. Municipal Court*, 411 U.S. 345 (1973); *Lefkowitz v. Newsome*, 420 U.S. 283 (1975).

same constitutional claims (App. A141). The Ohio Supreme Court consolidated his appeal with three others raising the same issues and on December 7, 1978, in a decision reported under the name of *State v. Ronald Burgun, et al.*, 56 Ohio St. 2d 354 (1978),[4] the Ohio Supreme Court rejected petitioner Turoso's arguments and upheld the constitutionality of Ohio Revised Code §§ 2907.01 and 2907.32. Petitioner Turoso's application for rehearing was denied by the Ohio Supreme Court on January 17, 1979.[5]

Petitioner Turoso then filed a petition for a writ of habeas corpus on April 23, 1979 in the United States District Court for the Northern District of Ohio, pursuant to 28 U.S.C. §§ 2241 and 2254, to challenge his conviction and sentence in that case on the basis of the unconstitutionality of the Ohio obscenity statutes.

Petitioner Dalene Burgun followed a similar path. After the Ohio Court of Appeals, Eighth Appellate District affirmed her conviction and sentence, she appealed to the Ohio Supreme Court and argued there that Ohio's criminal obscenity statute is unconstitutionally vague and overbroad. On September 13, 1979, the Ohio Supreme Court dismissed her appeal for want of a substantial constitutional question (App. A311). She then filed for habeas relief in the United States District Court for the Northern District of Ohio on October 4, 1979.

Meanwhile, by the time the Ohio Court of Appeals rendered its decisions affirming petitioner Turoso's two other convictions and the convictions of petitioners Spiker and Lee, the Ohio Supreme Court had already upheld the constitutionality of Ohio's obscenity statutes in *State v. Burgun, supra*, and had denied a petition for rehearing.

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4 Ronald Burgun should not be confused with Dalene Burgun, one of the petitioners in the present case.

5 The Ohio Supreme Court adhered to its position that Ohio's obscenity laws are constitutional on March 21, 1979 in *State v. Thomas*, 57 Ohio St. 2d 71 (1979).

Recognizing the futility of further appeals to the Ohio Supreme Court under these circumstances,[6] petitioners Spiker, Lee and Turoso, in his two remaining cases, then challenged their convictions and sentences by petitions for writs of habeas corpus[7] filed in the United States District Court for the Northern District of Ohio.[8]

There were then six separate petitions for writs of habeas corpus brought by the four petitioners here pending before four different judges of the United States District Court for the Northern District of Ohio. Each of the habeas petitions raised the same issues concerning the constitutionality of Ohio's criminal obscenity statutes. In four of these cases, habeas relief was granted by the district court and in two cases habeas relief was denied.

District Judge John M. Manos, before whom three of the cases were pending, determined that Ohio's criminal obscenity

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6 The correctness of this determination was made clear when, on March 21, 1979, the Ohio Supreme Court reaffirmed its decision in *Burgun* in the case of *State v. Thomas, supra.*

7 Petitioner Spiker filed her habeas petition on April 13, 1979; petitioner Lee filed on March 14, 1979; and petitioner Turoso filed his two other petitions on March 9, 1979 and May 18, 1979.

8 28 U.S.C. §2254 provides that a state prisioner need not exhaust all state court appeals prior to seeking federal habeas relief when ". . . there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisioner." It is well settled that by virtue of this language, the statute does not require a party to exhaust futile state appeals before filing his federal petition for habeas corpus as, for example, when the state's highest court has already clearly rejected the party's arguments in other cases and there is no reason to believe that the court is inclined to change its position. *Lucas v. People of State of Michigan,* 420 F. 2d 259 (6th Cir. 1970); *Rachel v. Bordenkercher,* 590 F. 2d 200, 204 (6th Cir. 1978); *Perry v. Blackledge,* 453 F. 2d 856, 857 (4th Cir. 1971); *Layton v. Carson,* 479 F. 2d 1275, 1276 (5th Cir. 1973); *Tetzel v. Hanlon,* 530 F. 2d 1205 (5th Cir. 1976); *Stubbs v. Smith,* 533 F. 2d 64 (2d Cir. 1976).

law as construed by the Ohio Supreme Court is unconstitutionally overbroad and vague. He, therefore, granted habeas relief to petitioner Spiker and in the two cases pending before him brought by petitioner Turoso (App. A269-A274, A24-A113, A130-A135).

District Judge Ann Aldrich also found Ohio's obscenity law as interpreted by the Ohio Supreme Court to be unconstitutionally vague and overbroad. She, therefore, granted habeas relief to petitioner Lee (App. A340-A343).

District Judge Thomas came to an opposite conclusion and, therefore, denied habeas relief to petitioner Turoso in his third case (App. A191-A237). Chief Judge Battisti also upheld the constitutionality of Ohio's criminal obscenity law and, accordingly, denied habeas relief to petitioner Dalene Burgun (App. A295-A308).

All six of the cases were separately appealed to the United States Court of Appeals for the Sixth Circuit, but were consolidated for decision by that court. Over the vigorous dissent of Circuit Judge Merritt, the majority in the Sixth Circuit upheld the constitutionality of Ohio's criminal obscenity law in an opinion issued on February 4, 1982. A petition for rehearing was denied on April 15, 1982, with Judge Merritt again dissenting.

The petitioners now seek review by this Court of the decision rendered by the Sixth Circuit Court of Appeals.

## REASONS FOR GRANTING THE WRIT

**AN IMPORTANT QUESTION, UPON WHICH THERE IS SHARP DISAGREEMENT AMONG THE FEDERAL DISTRICT AND CIRCUIT JUDGES WHO HAVE CONSIDERED IT, IS PRESENTED AS TO WHETHER OHIO'S CRIMINAL OBSCENITY STATUTES, AS CONSTRUED BY THE OHIO SUPREME COURT, ARE UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS DUE TO OVERBREADTH OR VAGUENESS.**

There can be little doubt that the questions squarely raised by this petition for a writ of certiorari are important and substantial: whether or not Ohio makes it a crime, under its obscenity statute as construed by the Ohio Supreme Court in *State v. Burgun*, 56 Ohio St. 2d 354 (1978), to publish literature which is protected by the First Amendment and whether or not Ohio has given clear and specific notice of what ideas its citizens may express without fear of criminal prosecution under that statute.

Two federal district judges and a Circuit Judge who carefully considered these issues all were left with the firm and clear conviction, persuasively expressed in written opinions, that Ohio's obscenity law as construed by the Ohio Supreme Court in *Burgun* is flagrantly unconstitutional under the First and Fourteenth Amendments due to overbreadth and vagueness. Those federal district and Circuit Judges who arrived at the contrary conclusion that Ohio's obscenity law as construed by the Ohio Supreme Court is valid, nevertheless, implicitly acknowledged that the constitutional attacks waged against the statute were by no means insubstantial.

Thus, the majority in the court below in this case acknowledged that the petitioners' ". . . claims have superficial appeal" (App. A10); conceded that, ". . . taken alone, certain of the disjunctive definitions of 'obscene' in section 2907.01(F) may appear to apply only to protected activity, such as simple

nudity and violence" (App. A13); and agreed ". . . with the dissent that the language in [another Ohio Supreme Court decision] is disturbing. . . ." (App. A18).

In this posture, with the issues so sharply debated by federal district and Circuit Judges alike, but with all of these Judges in agreement that the issues are, indeed, substantial, the question of the constitutionality of Ohio's obscenity law should be heard and settled by this Court. For it is not too much to suggest that what hangs in the balance is freedom of expression in the State of Ohio.

In order to place the issues raised by this case in their proper perspective, it is important first to review the constitutional defects of Ohio's criminal obscenity law as written and then to consider whether the Ohio Supreme Court's decision in *Burgun* remedied those defects.

## A. The Overbreadth And Vagueness Of Ohio's Criminal Obscenity Law As Written.

In its landmark decision in *Miller v. California,* 413 U.S. 15 (1973), this Court defined the limitations imposed by the First and Fourteenth Amendments upon the power of the states to proscribe obscenity. This Court held:

> [W]e confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently

> offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24 (footnote and citations omitted).
>
> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law as written or construed. *Id.* at 27.

On January 1, 1974, subsequent to this Court's decision in *Miller,* Ohio Revised Code §§ 2907.32 and 2907.01, the statutes challenged here, became law. Section 2907.32 of the Ohio Revised Code makes it a crime to disseminate obscene materials while Section 2907.01 of the Ohio Revised Code defines obscenity. That statutory definition, in relevant part, is as follows:

> Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:
>
> (A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.
>
> (B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.
>
> (C) "Sexual activity" means sexual conduct or sexual contact, or both.
>
> * * * * *
>
> (F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group,

judged with reference to that group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the

> top of the nipple, or of covered male genitals in a discernibly turgid state.

The first occasion on which a federal court measured this definition of obscenity against the standards enunciated in *Miller* occurred when the district court issued the first of two opinions in *Sovereign News Co. v. Falke*, 448 F. Supp. 306 (N.D. Ohio 1977), *remanded*, 610 F. 2d 428 (6th Cir. 1979), *cert. denied*, 447 U.S. 923 (1980), *opinion on remand* issued Sept. 19, 1980 (N.D. Ohio); *reversed*, 674 F. 2d 484 (6th Cir. 1982). On that occasion, District Judge John M. Manos issued a declaratory judgment finding Ohio Revised Code §§ 2907.01 and 2907.32 unconstitutional. In the course of a scholarly and extensive opinion, he found those statutes to be unconstitutional due to their substantial overbreadth and vagueness and upon a determination that they were not susceptible to an authoritative construction by the state courts that would cure their constitutional infirmities.[9] On the question of overbreadth, the district court held in *Sovereign I* at 448 F. Supp. 400:

> The court finds that in four separate instances § 2907.01 defines "obscenity" in a manner that restricts constitutionally protected expression.

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9 While an appeal from that decision was pending in the Sixth Circuit, the Ohio Supreme Court decided *State v. Burgun*, 56 Ohio St. 2d 354 (1978). In that case, the Ohio Supreme Court, while implicitly conceding that Ohio Revised Code § 2907.01 is unconstitutional as written, nevertheless upheld its constitutionality on the theory that the statute could be saved if the three-pronged *Miller* test for obscenity were merely added to the end of the statutory language by judicial interpretation. The Sixth Circuit then remanded *Sovereign v. Falke* to the district court for further consideration of the constitutionality of Ohio's obscenity law in light of the *Burgun* decision (610 F. 2d 428). Upon further consideration, District Judge Manos, in another extensive opinion issued on Sept. 19, 1980, again found Ohio's obscenity law, even as interpreted in *Burgun*, to be constitutionally infirm due to overbreadth and vagueness (App. A30). On appeal, the Sixth Circuit reversed that judgment in an order issued on the same day as the decision rendered by the Sixth Circuit in the present case (674 F. 2d 484).

*First*: Section 2907.01(F)(1), (2), (3), (4) and (5) fail to incorporate the three-part *Miller* test. The *Miller* test is a conjunctive three part test, *all* parts of which must be satisfied before the material may be found obscene . . . However, under Ohio Revised Code § 2907.01 material may be found obscene without the state being required to prove each of the three parts of *Miller.* An example of this is § 2907.01(F)(1) which defines as "obscene", material whose " . . . dominant appeal is to prurient interest." Under Subsection (F)(1), the *Miller* requirements that (b) the material be "patently offensive" and (c) that "taken as a whole, it lacks serious literary, artistic, political or scientific value," need not be proven by the state before material can be found obscene. It is evident, therefore, that material which is not patently offensive, and which has, for example serious literary value, may, under Ohio Revised Code § 2907.01(F)(1), be found obscene. The Court concludes that Ohio R.C. § 2907.01 restricts material which is not "obscene", making the statute overbroad.

*Second:* Section 2907.01(F)(3) unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of *Miller* that only material depicting or describing sexual conduct may be barred as being obscene. *See, Miller v. California, supra,* 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrains free expression, and the statute is therefore overbroad.

*Third:* Section 2907.01(F)(1)(2)(3) and (5) unconstitutionally restrict the display and description of non-active sexual conduct. For example, simple nudity, such as the showing of a female breast or a male buttocks, may be considered obscene under § 2907.01 (F). A sexual depiction of that kind is not hard-core pornography, and cannot be restricted as

> being obscene . . . Therefore the court finds § 2907.01 (F)(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.
>
> *Fourth:* Section 2907.01(F)(1) does not define with the requisite specificity the sexual acts the description or depiction of which is restricted. Subsection (F)(1) declares that any material whose "dominant appeal is to prurient interest" is obscene. The subsection is unconstitutionally overbroad because it does not list the types of sexual conduct to be restricted, and therefore may be applied to the depiction of sexual conduct not subject to restriction. (Footnotes omitted).

In the same decision, the district court also found Ohio Revised Code Section 2907.01 to be unconstitutionally vague because of its failure to satisfy *Miller's* requirement that a state obscenity law specifically define the sexual conduct whose depiction or description is proscribed. The most glaring example of the statute's impermissible vagueness is found in subsection (1) of Ohio Revised Code § 2907.01(F). That subsection defines as obscene any material whose ". . . dominant appeal is to prurient interest." The subsection completely fails to define or list the sexual depictions included within its terms, contrary to *Miller's* express requirement.

There is little disagreement with the district court's conclusion in *Sovereign I* that, as written, Ohio Revised Code § 2907.01 is unconstitutionally overbroad and vague. Even those federal district and Circuit Judges who, in the present cases, upheld the constitutionality of Ohio's obscenity law as interpreted by the Ohio Supreme Court, acknowledged the unconstitutionality of that law as written (App. A220-A223, A300, A13).

The question upon which there has been sharp disagreement, however, is whether or not the Ohio Supreme Court saved the constitutionality of the statute by its decision in *Burgun*. The petitioners respectfully submit that that is a question worthy of review by this Court.

**B. The Overbreadth And Vagueness Of Ohio's Criminal Obscenity Law As Interpreted By The Ohio Supreme Court.**

In *State v. Burgun*, 56 Ohio St. 2d 354 (1978), the Ohio Supreme Court was presented with its first challenge to the constitutionality of Ohio Revised Code § 2907.01. While it conceded that the statute's definition of obscenity as written could not survive a constitutional attack, it nevertheless determined that it could uphold the statute by merely adding to the statutory language, by judicial construction, the three-pronged *Miller* test. The court stated its holding as follows:

> We hold that R.C. 2907.01(F) is neither unconstitutionally overbroad nor void for vagueness when it is read *in pari materia* with the *Miller* decision. The *Miller* test for defining obscenity is therefore incorporated into that statute by an "authoritative" state court construction specifically sanctioned by *Miller.*
>
> *In addition, a close reading of R.C. 2907.01 in its entirety shows that the statute is not vague but rather extremely precise in defining what conduct is prohibited.* Thus, since the current statutory definition has been effectively narrowed to constitutionally permitted parameters, the appellants' proposition of law has no merit.
>
> *In three of the four appeals before this court the trial court adhered to the foregoing interpretation of Ohio obscenity law. In each instance the jury was instructed initially under the Ohio statute and then given a "narrowing" instruction restricting the definition of obscenity to the test laid down in Miller.* In light of that interpretation and application of R.C. 2907.01(F) this proposition of law is not well-taken and hereby overruled, except in *State v. Burgun*, case No. 77-1144, where the failure to instruct on *Miller* was reversible error. *State v. Burgun, supra*, at 56 Ohio St. 2d 361-362 (Emphasis added).

It is apparent from its opinion and its holding that the Ohio Supreme court did not alter or tamper with the language of Ohio Revised Code § 2907.01 itself; rather, what the court did was *add* to it. District Judge Manos analyzed the effect of this judicial addition to the statutory definition of obscenity in his second opinion in *Sovereign News Co. v. Falke*, at pp. 12-13:

> In *Burgun*, the Ohio Supreme Court left the language of Revised Code § 2907.01 intact. Instead, it attempted to remedy the statute by merely tacking onto it the three-pronged *Miller* formula, the second prong of which requires either the state legislature or the state courts to define with specificity what kinds of sexual depictions may be found obscene. The Ohio Supreme Court declined to specify what kinds of sexual depictions may be found obscene, however, and left the language of Revised Code § 2907.01 completely intact to serve that purpose. The result is that the Ohio Supreme Court created a circular definition of obscenity which always leads to and depends upon the language employed in Revised Code § 2907.01 itself.
>
> The second part of the *Miller* test of obscenity, which has been added to Revised Code § 2907.01 by the *Burgun* decision, reads as follows:
>
> > "(b) whether the work depicts or describes in a patently offensive way sexual conduct *specifically defined by the applicable state law; . . . .*" *Miller, supra*, at 413 U.S. 24 (Emphasis added).
>
> It is clear from this language that the *Miller* formula is not a self-sufficient definition of obscenity. On the contrary, *Miller's* second prong can be implemented only by legislation, or judicial interpretation of legislation, which specifically prescribed what types of sexual depictions or descriptions may be obscene. When, as is true of Revised Code § 2907.01, the law as written lacks the requisite precision and censors

expression which is constitutionally protected, *Miller* requires an authoritative construction which affirmatively supplies the missing specificity and which limits the law's reach to a ban on designated hard-core pornography.

In the *Burgun* decision, however, the Supreme Court of Ohio declined to list what kinds of sexual depictions may be found obscene under Revised Code § 2907.01. Instead, the court found that the statutory language alone and without judicial interpretation is narrow and specific enough to comply with *Miller's* second prong. The court expressly stated that Revised Code § 2907.01 is " . . . extremely precise in defining what conduct is prohibited." *Burgun, supra,* at 56 Ohio St. 361. Accordingly, in adding the *Miller* formula to Revised Code § 2907.01, the Supreme Court of Ohio did not alter in any fashion the law's recital of the *kinds* of descriptions or depictions which may be found obscene in Ohio.

The majority in the court below appeared to recognize that Ohio's obscenity law could not be saved by the mere addition of *Miller's* guidelines without a specific recitation of the kinds of sexual conduct whose depiction is to be banned under the law, as required by the second *Miller* guideline. But the majority concluded that the Ohio Supreme Court had added the requisite specificity in *Burgun* by implication. Specifically, the majority determined that the Ohio Supreme Court, in adding the three-pronged *Miller* test to the statute, had impliedly incorporated into the statute as well the examples given by this Court in *Miller* of what could be regulated under the second prong of the *Miller* test.[10] Thus, the majority con-

10 In *Miller,* this Court had stated:

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra:*

*(footnote continued)*

cluded, the Ohio law could be upheld under the authority of this Court's decision in *Ward v. Illinois* 431 U.S. 767 (1977).

In *Ward*, this Court sustained the constitutionality of Illinois' criminal obscenity statute which, unlike Ohio's law, was phrased in simple but general language upon which it was easy to place a limiting judicial gloss that could be harmonized with the actual wording of the statute.[11] This Court upheld the Illinois statute because it had been given an authoritative construction by the state's highest court which not only incorporated into it the *Miller* guidelines, but also incorporated into it the explanatory examples given in *Miller* of the kinds of sexual depictions which can validly be regulated under the second prong of the *Miller* guidelines.

In the present case, the majority concluded that, like the Illinois statute, Ohio's law could be upheld on the theory that, although it did not do so expressly, the Ohio Supreme Court in *Burgun* incorporated *Miller's* explanatory examples into Ohio's statute by implication. In reaching this conclusion, the majority ignored the overwhelming evidence to the contrary found by District Judge Manos in *Sovereign II*. At pp. 16-19 of his opinion, District Judge Manos recounted the convincing evidence showing that the Ohio Supreme Court had not adopted *Miller's* explanatory examples:

> *First*, unlike the Illinois Supreme Court, the Ohio Supreme Court has affirmed findings of obscenity in cases clearly not involving the kind of sexual depictions given as examples in *Miller*. *State ex rel. Keat-*

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(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller, supra*, 413 U.S. at 25 (footnotes omitted).

11 The Illinois statute defined obscenity as follows:

"A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

*ing v. Vixen*, 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973), is a particularly apt example, because that case is cited with approval by the Ohio Supreme Court in *Burgun*. The decision in *Vixen* was the second one that had been rendered by the Ohio Supreme Court in that case. The first time that court considered the case, it found that the film 'Vixen' was obscene under Revised Code § 2905.34, the predecessor to Revised Code § 2907.01, and affirmed an injunction against the film's exhibition. *State ex rel. Keating v. Vixen*, 27 Ohio St. 2d 278 (1971). That decision was appealed to the United States Supreme Court, which vacated the judgment and remanded the case for further consideration in light of *Miller* and its companion cases. *A Motion Picture Film Entitled 'Vixen' v. Ohio*, 413 U.S. 905 (1973).

On remand, the Ohio Supreme Court found that definition of obscenity then in force in Ohio comported, on its face, with *Miller* and that the film 'Vixen' was, indeed, obscene. *State ex rel. Keating v. 'Vixen'*, 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973).

The film found by the Ohio Supreme Court to be obscene, even after *Miller* was decided and considered, was described by the Ohio Supreme Court in its earlier opinion as follows:

> "The principal character, Vixen, is a buxom young wife, whose 'square' husband is a combination pilot and fishing guide in the wilderness of British Columbia. His work keeps him away from their home for extended periods of time. Among the other characters are Vixen's motorcycle hood brother, a Canadian Mountie, with whom Vixen passes the first few minutes of the film, a vacationing couple who are guest-clients of the husband, a black American whom Vixen de-

> spises and who has fled the country to avoid the draft, and an Irish communist who attempts at gun-point to force Vixen's husband to fly him to Cuba. The first four are objects of Vixen's lechery.
>
> "The movie is approximately 70 minutes long, out of which approximately one-half deals with incest, adultery, and lesbianism, which are graphically portrayed through facial and bodily expressions indicative of orgasmic reaction. The remaining one-half of the movie leads the viewer through such contemporary issues as racism, anti-militarism, communism and airplane hijacking. *It should be noted that, although the players are frequently shown nude and at full length, at no place are their genital parts exposed to the leering lens of the camera.*"

(Emphasis added; 272 N.E.2d at 139). The court further noted, at 272 N.E.2d 140:

> "Assume, hypothetically that the main character in 'The Sound of Music' performs during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated merely because the producer had an 'eye on the recent Supreme Court rulings?' The question supplies its own answer.
>
> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse."

(Footnotes omitted).

As described by the Ohio Supreme Court, the film "Vixen" clearly is not the kind of hardcore pornography which *Miller* permits the states to censor. Indeed, based on the description given by the Ohio Supreme Court, "Vixen" is less explicit than the film found to be protected by the First Amendment in *Jenkins v. Georgia*, 418 U.S. 161 (1974).

Similarly, the Ohio Supreme Court's suggestion that "The Sound of Music" could be rendered obscene by the inclusion of a single act of sexual lewdness in one scene completely ignores what has been basic constitutional law since the 1957 decision of the Supreme Court in *Roth v. United States*, 354 U.S. 476 (1957)—that, in judging whether a work is obscene, it must be considered as a whole and in its entirety.

Thus, unlike the decisions rendered by the Illinois Supreme Court summarized in *Ward*, the decisions of the Ohio Supreme Court have not applied the state's obscenity statute only to works which depict the kinds of hardcore sexual conduct given as examples in *Miller*. For this reason, initially, this court concludes that in *Burgun*, which cited the *Vixen* decision with approval, the Ohio Supreme Court did not intend to adopt the *Miller* examples or to narrow the Ohio obscenity statute to the kinds of sexual depictions set forth in those examples.

*Second*, unlike Illinois' obscenity law, Ohio's law does not lend itself to an interpretation which incorporates *Miller*'s explanatory examples. While subsection (F)(1) of Revised Code § 2907.01, which defines as obscene any material whose "dominant appeal is to prurient interest," is open-ended, subsections (F)(2), (3), (4) and (5) are not. Those latter subsections define obscenity in detailed terms which substantially exceed and cannot be reconciled with the *Miller* examples. Revised Code § 2907.01, unlike Illinois' open-ended law, simply is not susceptible to

an interpretation incorporating in it the *Miller* examples. This fact, along with the Ohio Supreme Court's statement in *Burgun* that it believes Revised Code § 2907.01 to be " . . . extremely precise in defining what conduct is prohibited," *Id.* at 56 Ohio St. 2d 361, leads to the inevitable conclusion that the court in *Burgun* did not adopt the *Miller* examples.

*Third,* the Ohio Supreme Court, in *Burgun,* quoted a passage from *Miller* which contained the three-pronged *Miller* test but which *excluded* the portion of the *Miller* decision which set forth examples of what a state could validly regulate under the second prong of the *Miller* test. By way of contrast, one of the Illinois Supreme Court decisions upon which the court in *Ward* relied to uphold Illinois' statute quoted the passage from *Miller* which included the explanatory examples. The court, in *Ward,* found this fact to be very significant and concluded from it that the Illinois Supreme Court had incorporated *Miller's* explanatory examples into the state's obscenity law.

*Fourth,* the jury instructions given in the three cases in which convictions were affirmed by the Ohio Supreme Court in *Burgun* are most revealing. The affirmance of those convictions was expressly based upon the fact that the jury instructions given by the trial court in those cases conformed to the interpretation given to Revised Code § 2907.01 by the Ohio Supreme Court in *Burgun*. The Ohio Supreme Court specifically held that those instructions represented correct recitals of the definition of obscenity under Ohio law, *as construed in Burgun.* In each of those three cases, the trial court read Revised Code § 2907.01(F) to the jury. It then read to the jury the three-pronged *Miller* test *without any reference to Miller's explanatory examples.* Thus, in each of those three cases the trial court's instructions to the jury on the second prong of the *Miller* formula was substantially as follows:

> " . . . Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." (From p. 532 of the trial transcript in *State v. Krute,* one of the cases affirmed in *Burgun,* supra.)

Given the fact that the Ohio Supreme Court affirmed the convictions in those three cases on the express ground that the jury instructions given by the trial courts correctly stated the definition of obscenity under Revised Code § 2907.01, as construed in *Burgun,* the conclusion is inescapable that the Ohio Supreme Court did not incorporate into Ohio's obscenity law *Miller's* explanatory examples.

Perhaps betraying its own uneasiness with the conclusion that the Ohio Supreme Court had adopted the *Miller* examples, particularly in the face of such convincing evidence to the contrary detailed in the district court's opinion in *Sovereign II,* the majority in the court below also advanced a second, alternative basis for its determination that the *Burgun* decision spared Ohio Revised Code § 2907.01 from constitutional demise.

The majority observed that the second guideline in *Miller* is "whether the work depicts in a patently offensive way, *sexual conduct* specifically defined by the applicable state law." *Miller, supra,* at 413 U.S. 24 (Emphasis added). The majority then noted that the term "sexual conduct", found in *Miller's* second prong, is also a term which is specifically defined by paragraph (A) of Ohio Revised Code § 2907.01 and that the definition given there is consistent with the *Miller* examples. Since the Ohio Supreme Court adopted the three *Miller* guidelines, including the second one which uses the term "sexual conduct", and since the term "sexual conduct" is defined by paragraph (A) of Ohio Revised Code § 2907.01, the majority reasoned, the Ohio Supreme Court saved the constitutionality of the state statute by limiting the reach of the statute as a whole to only those depictions falling within the definition of "sexual conduct" set forth in paragraph (A) of R.C. § 2907.01.

The problem with this analysis is that the Ohio Supreme Court did not do, nor did it intend to do, that which the majority attributed to it. Furthermore, as the majority itself stated in its opinion, "[i]t is unreasonable to consider only discrete sections of the statute in order to determine its validity" (App. A10-A11). Yet that is precisely what the majority did by focusing so narrowly upon the definition of "sexual conduct" contained in paragraph (A) of Ohio Revised Code § 2907.01 without a proper regard to the context in which that term is defined and its relationship to the entire statutory scheme defining obscenity.

The primary source of the definition of obscenity in Ohio is paragraph (F) of R.C. § 2907.01. That section, set forth verbatim at pp. 10-11, above, provides, in distinct subparts, five separate and disjunctive definitions of obscenity. Some of the words used in the five subparts of subsection (F) are themselves defined in other subsections of Ohio Revised Code § 2907.01. For example, nudity is defined in subsection (H), sexual excitement in subsection (G) and sexual activity in subsection (C). But these subsections are relevant to the question of obscenity *only* because the words defined by them are found in subsection (F) of the statute, where the term obscenity is itself defined. Thus, these subsections do not serve primary roles in the definition of obscenity, but rather serve subsidiary and secondary functions in that they further define terms used in the primary definition of obscenity set forth in subsection (F).[12]

The definition of sexual conduct found in subsection (A) of R.C. § 2907.01 is even one step further removed from the definition of obscenity in Ohio. That term is not even used in the definition of obscenity set forth in subsection (F) of R.C. § 2907.01. It is relevant to the definition of obscenity only because, as set forth in subsection (C) of R.C. § 2907.01, the

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12 Some of these subsections also serve the function of defining words used in other statutes contained in Chapter 2907 of the Revised Code and which define offenses other than those involving the dissemination of obscene material.

definition of sexual activity, which *is* used in the definition of obscenity, includes but is not limited to sexual conduct.

Given this statutory structure, in which the term sexual conduct plays such a minor role, it is hard to believe that the Ohio Supreme Court in *Burgun* intended, without saying so, to turn it upside down by making the definition of sexual conduct paramount and the detailed definition of obscenity subservient. In fact, it is clear that that is not what the court did. The syllabus itself in *Burgun* expressly states that it was "R.C. § 2907.01 *(F)*" that was being "authoritatively construed to incorporate the guidelines prescribed in *Miller* . . . . " Moreover, the opinion of the Ohio Supreme Court in *Burgun* is dominated by a discussion of the definition of obscenity contained in subsection (F) of R.C. § 2907.01. The definition of sexual conduct under subsection (A) of R.C. § 2907.01 is never even mentioned or cited anywhere in the court's opinion in *Burgun*.

It is clear that when the Ohio Supreme Court in *Burgun* incorporated that part of the *Miller* test which requires a work to depict " . . . sexual conduct specifically defined by the applicable state law" the court did not thereby limit or intend to limit the reach of Ohio's obscenity law to only those depictions included within the definition of sexual conduct set forth in subsection (A) of Ohio Revised Code § 2907.01. Rather, the court left subsection (F) of Ohio Revised Code § 2907.01 intact and on the books to serve as the applicable state law specifically defining the sexual conduct which may be found obscene in Ohio.

And, petitioners submit, that is precisely why the statute remains unconstitutionally overbroad and vague even after *Burgun*. The statute still censors depictions of nudity, defined so broadly as to include the showing of any portion of a female breast "below the top of the nipple" and the showing of a male or female buttock with "less than a full opaque covering." *See* Ohio Revised Code § 2907.01(H). The statute still defines as obscene the depiction of "sexual activity" which, as defined includes "sexual contact," which in turn includes a depiction of a man touching a woman's thigh. *See* Ohio

Revised Code §§ 2907.01(B) and (C). The statute still outlaws depictions of extreme or bizarre violence, cruelty and brutality. Ohio Revised Code §§ 2907.01(F)(3) and (5). And the statute still censors expression whose "dominant appeal is to prurient interest," without specifying the kinds of sexual conduct the description or depiction of which is prohibited by that phraseology. As Judge Merrit stated in his dissenting opinion in the court below:

> . , . all the Supreme Court of Ohio has done is simply add the *Miller* standards as a new, alternative method of sending people to prison while leaving in effect alongside it the old unconstitutional method outlawing graphic expression of "sexual excitement", "nudity", "bizarre violence" and "human bodily functions." (App. A22).

The majority opinion in the court below proceeds upon an erroneous premise. Because the Ohio Supreme Court held in *Burgun* that Ohio Revised Code § 2907.01 must be read *in pari materia* with *Miller*, the majority assumed that, without striking down or excising any of its language, the statute *can* be read *in pari materia* with *Miller*. But the Ohio Supreme Court never offered any guidance as to precisely how that could be accomplished. That court never explained how to get the square peg of Ohio Revised Code § 2907.01 to fit into the round hole of *Miller*, without cutting off its four corners. That court simply announced that it would fit. But the laws of physics are not amenable to change by judicial decree.

The majority in the court below itself noted that, " . . . it is possible that a reading of both *Miller* and the statute creates redundancies and surplusage." (App. A13). It is respectfully submitted that a reading of both *Miller* and the statute creates not mere redundancies and surplusage, but irreconcilable conflict. So long as there remains, as part of the statute, language which defines as obscene the depiction of semi-nudity, violence, the mere touching of another's thigh and the like, it will be impossible to read the statute *in pari materia* with *Miller*.

The decision in the court below, while upholding one state's criminal obscenity law, will have a far-reaching effect on the law of obscenity throughout the nation. For the majority in the court below has expanded *Ward* in a way never intended by this Court. It has taken a statute whose actual language is at war with *Miller* and upheld it, not, as *Ward* permits, *because* the state's highest court had by judicial construction affirmatively removed or limited those actual words of the statute which render it facially overbroad and vague, but rather, *despite* the refusal of the state's highest court to do so. In the name of *Ward,* it has taken a statute whose language directly conflicts with *Miller* and, in sustaining it, has required nothing more than the bare assertion by the state's highest court that the statutory language can peacefully co-exist side by side with the *Miller* test without any reconciliation of the conflicts between the two.

This important decision by a federal court of appeals has breathed new life into the very kinds of broadbased statutes outlawing speech *Miller* was fashioned to eradicate and *Ward* did not intend to revive. It represents an open invitation to state legislatures to enact criminal obscenity laws which broadly stifle protected expression and holds out the promise to them that these laws will withstand constitutional attack so long as the *Miller* guidelines are inserted as a footnote to the statutory language by judicial construction.

In short, the decision below makes hollow this Court's promise in *Miller* that:

> Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. *Id.* at 413 U.S. 27.

As Judge Merritt stated so cogently in dissent:

> . . . this is a statute outlawing speech and artistic expression; it requires a more sensitive readin of the

> First Amendment than our Court has given. Unlike the relatively healthy state statute saved in *Ward v. Illinois* by insertion of a *Miller* pacemaker, the heart of the Ohio statute in question here is malignant. A *Miller* pacemaker will not regulate it. If our Court's opinion stands as the law of obscenity, then all state obscenity statutes will be upheld as valid, no matter how broadly or specifically they censor protected speech, so long as the *Miller* standards are repeated to the jurors after they are instructed to apply the unconstitutional statute. (App. A19)

This Court should grant the petition for a writ of certiorari to consider the important issues presented by this case.

## CONCLUSION

For the reasons stated, the petitioners respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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